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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,)	No. P1300CR20081339
)	
18 Plaintiff,)	Div. 6
)	
19 vs.)	MOTION TO COMPEL THE
)	STATE TO MAKE A PROPER
20 STEVEN CARROLL DEMOCKER,)	PROFFER FOR WITNESSES,
)	CLARIFY ITS WITNESS LIST
21 Defendant.)	AND PRECLUDE IT FROM
)	CALLING WITNESSES WITH
)	NO RELEVANT, ADMISSIBLE
)	TESTIMONY

22 **MOTION**

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24 Steven DeMocker, by and through counsel, hereby respectfully requests that the
25 Court order that the State: 1) make a proper proffer regarding selected witnesses (David
26 Soule, Debbie Hill, Debbie Kasprzak, Jeff Zyche, and Dean Shank) as previously
27 ordered; 2) disclose a witness list in compliance with Rule 15.1 and this Court's orders;
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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 MAR 10 PM 4:05 ✓

JEANIE HIGGS, CLERK

BY: S. FIELDS

1 and 3) is precluded under the Rules of Evidence from offering testimony from the
2 following witnesses: Sally Butler, Jana Johnson, Dr. Diane Cornsweet, Cody Buchser,
3 Nikki Check, Sean Bailey, Morgan Jay, Mike Bueler, Lynn Shoopman, Debbie and
4 Terry Sims, Dr. Fred Markham, Catherine and Larry Peterson, Tommy Meredith,
5 Sturgis Robinson, Jill Dyer, Dr. William Rubin, Dr. Michael Wineberg, Don Wood,
6 Carol Tidmarsh, and Richard Ach. This motion is based on the Court's prior Rule
7 404(b) rulings, the Court's prior in limine orders, the Due Process Clause, the
8 Confrontation Clause, the Eighth Amendment and Arizona counterparts, Arizona Rules
9 of Evidence, Arizona Rules of Criminal Procedure and the following Memorandum of
10 Points and Authorities.

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 As of the disclosure made on March 4, 2010, the State has identified 142 witnesses
13 and 26 experts. The Court has repeatedly ordered the State to narrow its witness list and
14 the State has failed to do so. The State has scheduled defense interviews for witnesses
15 that have no relevant or personal knowledge. The State has provided inconsistent and
16 confusing indications about whether certain individuals are in fact witnesses or not. In
17 its "proffer" for several witnesses, the State indicates that the same witness is both "not
18 a witness" and "rebuttal." The State also describes the same individuals as "not a
19 witness" and yet lists the individuals as prosecution witnesses on its March 4, 2010
20 witness list. The Court has made rulings that certain officers may not testify as experts
21 (Commander Mascher and Detective Kennedy), and yet the State continues to identify
22 them as expert witnesses.¹ The State has late disclosed several experts and has not
23 disclosed those experts' conclusions, basis for their conclusions, their reports or
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26 ¹ It became apparent during a March 4, 2010 defense interview of Commander Mascher that he is engaged in on-
27 going "expert" analysis of the footprint evidence, which suggest the State still intends to use him as an expert. If
28 so, he has not yet produced a report of his findings, which means the defense will be required to interview him yet
again.

1 indicated with particularity what those witnesses relied upon in reaching any
2 conclusions. The defense is attempting to schedule interviews of State's witnesses and
3 allocate its time in preparing for trial but is unable to do so in an orderly fashion with
4 the State's inconsistent, incomplete and confusing identification of witnesses.

5 **I. Background.**

6 On February 17, 2010 the defense filed a Reply in Support of Motion to Preclude
7 Detectives Page and Kennedy from Testifying as Experts, an Objection to Qualifying
8 Additional Experts and a Motion to Compel the State to Make a Proffer Regarding
9 Witnesses. The defense identified 27 witnesses for which it either had insufficient
10 disclosure to identify the substance of their testimony or no disclosure at all. At the
11 hearing on February 19, 2010 the Court directed that the State be prepared to provide
12 proffers for the identified witnesses at the hearing on March 2. In a later pleading filed
13 on February 22, 2010 the defense identified two additional witnesses for whom it
14 requested a proffer, who had been late disclosed on February 18.² At the hearing on
15 March 2 the parties ran out of time and the State offered to provide the proffers in
16 writing. On March 4 at 6:30 p.m. the State disclosed in an email a three and a half page
17 "proffer" for twenty-eight witnesses. It is essentially useless. The State does not
18 indicate in this document what the witnesses' proposed testimony will be; what facts the
19 proposed testimony is relevant to; or in any other way meet the minimal requirements
20 for assisting the Court or the defense in determining the admissibility of the testimony.
21 A proffer is a detailed description of what the proposed evidence is and must be
22 descriptive enough to permit the Court to determine whether the testimony is relevant
23 and admissible. See Udall and Livermore, Law of Evidence, page 21, 3d ed. (West
24 Publishing 1991). See also Arizona Rule of Evidence 103.

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27 ² These witnesses were both late disclosed experts and will be addressed in a separate pleading.

1 testimony she is proposed to offer. The Court should prohibit any kind of general
2 rebuttal evidence that was prohibited in *Shepherd*.

3 Furthermore, the State has not identified which aggravating circumstance Ms. Hill
4 or any other rebuttal witness will be testifying in support of in this case. This is yet
5 another violation of the State's obligations under Rule 15.1(5)(a). This Court should
6 exclude the testimony of Ms. Hill absent a complete proffer and proper 15.1 disclosure
7 from the State within five days.

8 c. **Debbie Kasprzak** - Ms. Kasprzak is from RMIN and is identified as having
9 "personal knowledge." The State did not offer any proffer regarding Ms. Kasprzak.
10 The State should be ordered to comply with the Court's order to make a complete
11 proffer within five days or this witness should be excluded.

12 d. **Jeff Zyche** - the State's disclosure indicates "DNA swab obtained and swab
13 tested Auto repair paper found behind victim's residence." Again, the State makes no
14 attempt to demonstrate how this is remotely relevant to any fact in issue. Absent a
15 detailed proffer within five days, this evidence should be excluded under Rule 402.

16 e. **Dean Shank** - the State's proffer for Mr. Shank indicates both "not a witness"
17 and "rebuttal." Again the State also lists Mr. Shank in its March 4, 2010 witness list as
18 witness 125. The State does not identify what evidence Mr. Shank, Ms. Kennedy's
19 "spiritual teacher" might possibly rebut. This witness should be excluded under Rule
20 402 absent a detailed proffer regarding relevance within five days.

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22 **III. The State Should Be Precluded From Calling the Following Witnesses**
23 **Based on Rule 402 and 403.**

24 The State should be precluded pursuant to Rule 402 from calling the following
25 witnesses, who have nothing relevant to testify to based on the proffers provided by the
26 State. If the Court finds that any such witness has relevant testimony, Rule 403 should

1 preclude the testimony on the basis of the potential for unfair prejudice and confusion of
2 the jury which outweighs the minimal probative value, as detailed by witness below.

3 a. **Sally Butler** – the State’s proffer for Ms. Butler provides that she was a close
4 friend of Ms. Kennedy’s and knows “victim’s habits.” The defense does not know what
5 habits Ms. Butler is proposed to testify about other than Ms. Kennedy’s habit of running
6 after work, but does note that Ms. Butler did not live in Prescott at the time of the death
7 in this case.

8 The State’s proffer that Ms. Butler distanced herself from Mr. DeMocker because
9 she was displeased with the way he treated Ms. Kennedy or the fact that she had email
10 contact with Ms. Kennedy on July 2 should be excluded as irrelevant. Relevant
11 evidence is that which “tends to make the existence of any fact this is of consequence to
12 the determination of the action more probable or less probable than it would be without
13 the evidence.” Arizona Rule of Evidence 401. Evidence which is not relevant is
14 inadmissible pursuant to Arizona Rule of Evidence 402. The State has not indicated
15 what fact Ms. Butler’s distancing herself from Mr. DeMocker and emailing to Ms.
16 Kennedy is relevant to.

17 If the Court finds that the information relating to Ms. Butler’s distancing herself
18 from Mr. DeMocker based on her feelings about his “treatment” of Ms Kennedy is
19 relevant, it should be excluded under Rule 403 given the danger of unfair prejudice to
20 the jury.

21 b. **Jana Johnson** – the State’s proffer with respect to Jana Johnson is that she saw a
22 bike rider around 6:30 p.m. on July 2, 2008. It is clear from Ms. Johnson’s interview
23 that the person and bike she saw were neither Mr. DeMocker nor his bike. It is also
24 clear that she does not know what time she saw whomever she did see. This
25 information is not relevant and should be excluded pursuant to Rule 402. Alternatively,
26 Rule 403 applies to this evidence. The potential of confusion to the jury about
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1 testimony of a witness who saw some other person on some other bike at some time on
2 July 2 outweighs whatever minimal probative value may be derived from this
3 testimony.

4 c. **Dr. Diane Cornsweet**- the State's proffer indicates Dr. Cornsweet is "not a
5 witness." However, on March 4, 2010 the State disclosed a list of witnesses that
6 includes Dr. Cornsweet as witness number 64. Given that the State has elsewhere
7 removed witnesses from its list and then put them back on the list, it should be required
8 to identify with certainty, in accordance with Rule 15.1 and so that the defense can
9 prepare for trial, what witnesses it intends to call.

10 d. **Cody Anne Buchser** – the State's proffer for Ms. Bucher is that she "provided
11 real estate maps to Defendant." This is not relevant to any issue of fact and should be
12 excluded. The State has not indicated what fact in issue this is relevant to.

13 e. **Nikki Check** – the State's proffer for Ms. Check is that she was a close friend
14 "daily routine, Carol's run, not locked doors, phone call on 7/2/08." Ms. Check had not
15 seen or spoken with Ms. Kennedy between December of 2007 and July 2 of 2008 other
16 than to arrange to have dinner on July 3, 2008. Ms. Check's testimony is not relevant to
17 Ms. Kennedy's routine in July of 2008 and should be excluded pursuant to Rule 402.

18 f. **Sean Bailey** – the State's proffer indicates Mr. Bailey is "not a witness" however
19 on its March 4, 2010 witness list, Mr. Bailey is identified as witness 70.

20 g. **Morgan Jay** – the State's proffer indicates Mr. Jay is "not a witness" but Mr. Jay
21 is listed as witness 71 as of March 4, 2010.

22 h. **Mike Bueler** – the State's proffer indicates "Defendant was enrolled in Great
23 Expectations Rebuttal Witness." (sic). First, the State is bound by its prior
24 representations that it does not intend to inquire into relationships other than with
25 respect to Ms. O'Non and Ms. Girard. Second, even if the State had not repeatedly
26 indicated that it would not be offering this evidence, it is not relevant and should be
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1 excluded under Rule 402. Finally, the State has not identified what possible "rebuttal"
2 evidence Mr. Bueler could provide. Mr. Bueler should be excluded as a witness.

3 i. **Lynn Shoopman** – the State's proffer for Ms. Shoopman is "rain in Williamson
4 Valley on or about 7/1 and/or 7/2 of 2008." There is no disclosure for Ms. Shoopman
5 and no reason to believe that she has any specific or specialized information about
6 weather conditions that would make his or her testimony relevant. The State's proffer is
7 insufficient and Ms. Shoopman should be excluded pursuant to rule 402.

8 j. **Debbie and Terry Sims** – no disclosure is provided with respect to either Debbie
9 or Terry Sims. The State's proffer is "Defendant not at Hassayampa Fitness Center."
10 The State has not disclosed any statements or reports that would indicate how the Sims
11 would have this information or otherwise be competent to testify. Furthermore, if they
12 have provided a statement to this effect, it has not been disclosed, in violation of Rule
13 15.1. These witnesses should be excluded absent a showing that they have relevant
14 personal knowledge.

15 k. **Dr. Markham** – the State's proffer is that "DNA swab obtained and swab tested.
16 Rebuttal witness." The fact of Dr. Markham's DNA swab is not relevant and
17 presumably Dr. Markham is not qualified to testify as to the testing of the swab. Dr.
18 Markham should be excluded pursuant to Rule 402. Furthermore, the State has not
19 identified what possible evidence Dr. Markham might rebut.

20 l. **Catherine and Larry Peterson** – the State's proffer is that Catherine and Larry
21 Peterson "did not see Defendant in Williamson Valley area." No interview, statement
22 or other disclosure relating to Catherine Peterson has been provided to the defense.
23 Furthermore, Mr. Peterson was not interviewed until July 22, 2008 at which time he
24 said he could not recall seeing anyone on a bike on July 2, nearly 20 days earlier. He
25 also explained that the family "keeps their shades drawn on that side of the house so
26 they would not have seen anybody unless they were outside or looking out the
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1 window.” (2309). The fact that Mr. Peterson did not remember seeing someone 20
2 days after he would not have seen them since his shades were drawn is not relevant and
3 should be excluded under Rule 402.

4 m. **Tommy Meredith** – The State’s proffer for Mr. Meredith is “saw a white car
5 pull in to Defendant’s garage at around 10:00.” Mr. DeMocker did not drive a white
6 car, there is no allegation that he was driving a white car on July 2 and so this
7 information is not relevant and should be excluded pursuant to Rule 402.

8 n. **Sturgis Robinson** – the State identifies Mr. Robinson as “mitigation rebuttal
9 witness.” The State does not indicate what mitigation evidence Mr. Robinson is
10 proposed to rebut. Furthermore, the information to which Mr. Robinson’s testimony
11 relates, Mr. DeMocker’ business practices and client complaints, has been excluded by
12 agreement of the State and this Court’s orders. Mr. Robinson should be excluded based
13 on these representations and the Court’s prior 404(b) and in limine rulings. Finally, the
14 State has not identified which aggravating circumstance Mr. Robinson will be testifying
15 in support of. This is yet another violation of the State’s obligations under Rule
16 15.1(5)(a). This Court should exclude the testimony of Mr. Robinson.

17 o. **Jill Dyer** – the State’s proffer is “defendant’s application to social security for
18 Charlotte.” This does not have the tendency to make the existence of any fact of
19 consequence to the determination more or less probable and should be excluded
20 pursuant to 402.

21 p. **Dr. Bill Rubin** – the State’s proffer indicates “Carol/Barb document not
22 therapy.” First, Dr. Rubin and Mr. DeMocker enjoy a doctor - patient privilege. This
23 issue was raised in the defense motion and has been ignored by the State. The State
24 should be required within five days to indicate on what basis it proposes to violate the
25 privilege and how “Carol/Barb document not therapy” is remotely relevant under Rule
26 402. Otherwise, the State should be precluded from calling Dr. Rubin.

1 q. **Dr. Michael Wineberg** – the State’s proffer indicates that Dr. Wineberg is “not
2 a witness” and “rebuttal.” To further complicate matters, the State also listed Dr.
3 Wineberg as witness 122 on its March 4, 2010 witness list. The State should be ordered
4 to clarify its intent with respect to this witness by providing a valid witness list in
5 compliance with Rule 15.1 within five days.

6 r. **Don Wood** – the State’s proffer for Mr. Wood indicates that “Steven DeMocker
7 said Don Wood was duped by Carol Kennedy into believing that she feared for her life
8 from Steven DeMocker.” In disclosure Mr. Wood refers to an email he allegedly
9 received from Mr. DeMocker. This email has never been disclosed and is not
10 corroborated by any other witness, including Ms. Kennedy’s close friends or family.
11 This testimony is not credible, nor is it relevant and it should be excluded under Rule
12 402. If the Court determines that this witness is relevant, the defense asks for a ruling
13 that this evidence may not be offered as it would violate Rule 403 with the danger of
14 unfair prejudice. The probative value is de minimus given that the email has never been
15 disclosed and thus is wholly uncorroborated. The prejudicial value is obvious and great.

16 s. **Carol Tidmaret** – the State has made no proffer with respect to Ms. Tidmaret
17 (who counsel assumes must be Carol Tidmarsh), even though this witness is included on
18 the State’s witness list and was included in the original request for a proffer. However,
19 in its response to the Rule 404(b) motion the State indicates that it does not intend to
20 offer evidence relating to this unreported 2006 event *except in rebuttal*. Again, this kind
21 of rebuttal would be excluded even according to the case cited by the State. *State v.*
22 *Shepherd*, 27 Ariz. App. 448 (1976). This incident is not at all relevant, its admission
23 would violate Rule 404(b) and 403 and the State has not given the required notice of it
24 under Rule 15 or 404(b). The Court should exclude this testimony at any stage of the
25 proceeding given that it violates 404(b) and the State’s failure to properly notice this as
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1 a prior act. The defense requests either an *immediate* ruling excluding this testimony or
2 an expedited evidentiary hearing on this witness.

3 t. **Richard Ach** – the State’s proffer for Mr. Ach indicates “mitigation rebuttal
4 witness.” The State does not indicate what evidence will be rebutted, what evidence it
5 seeks to admit to rebut that evidence or what aggravator Mr. Ach might support. This
6 testimony is believed to relate to Mr. DeMocker’s business practices which have
7 already been excluded by this Court and which the State has already indicated it does
8 not intend to introduce. Mr. Ach’s testimony should therefore be excluded.

9 **CONCLUSION**

10 Defendant Steven DeMocker, by and through counsel, hereby requests that this
11 Court order the State to provide detailed proffers within five days for these witnesses
12 upon threat of exclusion, preclude the State from offering witnesses who have no
13 relevant and admissible testimony and order the State to disclose a witness list in
14 compliance with Rule 15.1 and this Court’s Orders.

15 DATED this 10th day of March, 2010.

16
17
18 By: 

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2 **ORIGINAL** of the foregoing hand delivered for
3 filing this 10th day of March, 2010, with:

4 Jeanne Hicks
5 Clerk of the Court
6 Yavapai County Superior Court
7 120 S. Cortez
8 Prescott, AZ 86303

9 **COPIES** of the foregoing hand delivered this
10 this 10th day of March, 2010, to:

11 The Hon. Thomas B. Lindberg
12 Judge of the Superior Court
13 Division Six
14 120 S. Cortez
15 Prescott, AZ 86303

16 Joseph C. Butner, Esq.
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